Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, *et al.*,

Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc., is a non-profit corporation established under the laws of the state of New York to assist African Americans and other people of color in securing their civil and constitutional rights through the prosecution of lawsuits that challenge racial discrimination.[1]

For six decades, LDF has represented parties in litigation before the Supreme Court involving matters of race discrimination in general, and employment discrimination in particular. LDF argued *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the case in which this Court recognized the disparate impact framework for analyzing employment discrimination claims under Title VII. LDF has also represented parties in other employment discrimination cases before this Court, including *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

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[1] This brief is filed with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Employment discrimination has proved more difficult to eliminate in firefighting than in perhaps any other employment sector, public or private. Firefighting is a highly desirable job for many Americans. But fire departments throughout the country, including in New Haven, have historically and notoriously denied employment to African Americans and other people of color. The development of Title VII of the Civil Rights Act of 1964 bears out this reality: The pervasive exclusion of blacks from fire departments nationwide was a central basis for Congress's decision in 1972 to extend that Act to cover state and local government employment.

The 1972 extension of Title VII and this Court's 1971 holding in *Griggs v. Duke Power Co.* have provided critical mechanisms to challenge both intentional discrimination and the use of "artificial, arbitrary, and unnecessary barriers to employment" that operate to exclude African Americans from firefighting. 401 U.S. 424, 431 (1971). Private and federal enforcement efforts have yielded some progress toward greater inclusion of African Americans in fire departments, but racial discrimination and widespread disparities persist. Ongoing efforts by cities like New Haven therefore remain necessary to fully and finally achieve equal employment opportunity for all Americans.

In this case, petitioners seek to establish a rule that avoidance of discrimination against African Americans necessarily amounts to intentional discrimination against whites. Given the persistence of racial discrimination against African Americans in

firefighting, this Court should reject petitioners' attempt to constrain employers' ability "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)). Petitioners' argument would *require* employers to maintain employment practices that perpetuate discrimination against minorities, and would eviscerate this Court's holding in *Griggs* that employment practices "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430.

ARGUMENT

In 2003, New Haven's fire department administered civil service examinations for promotion to lieutenant and captain. All test-takers were required to meet certain minimum qualifications, including experience in the New Haven Fire Department. Pet. App. 352a, 365a. Based on the exam results, although twenty-seven of the 118 test-takers for both positions were African American, JA225-26, no African Americans would have been eligible to fill any vacancies for lieutenant or captain positions. After considering its obligations under federal anti-discrimination law, New Haven declined to certify the exam results.

In light of the history and persistence of racial discrimination in the New Haven Fire Department, the city's decision here—to forgo making promotions based on a selection device that would produce un-

justified racial disparities in filling traditionally-segregated ranks that continue to exhibit conspicuous imbalances—is entirely permissible under both Title VII and the Equal Protection Clause of the Fourteenth Amendment.

I. Fire Departments Nationwide Have a Long History of Excluding African Americans.

A. Fire Departments Were Foremost Among the Workplaces that Prompted Congress to Extend Title VII to Public Employers in 1972.

There have been few, if any, sectors of public or private employment where racial discrimination has been more firmly entrenched than it has been in firefighting.[2] Widespread racial discrimination in public employment generally—and in fire departments in particular—was a key reason that Congress extended Title VII to state and local government employers in 1972, as the congressional record makes clear. Respondents' efforts more than three decades later to eliminate continuing employment discrimination in filling supervisory positions within New Haven's firefighting force must be viewed in light of this legislative history.

As originally enacted, Title VII exempted state and local employers from coverage. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (1964) (defining the term "employer" to ex-

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[2] In addition to African Americans, other minorities and women have long been—and continue to be—excluded from employment as firefighters. *See* Br. of Amici National Partnership for Women & Families, *et al.*; Br. of Amici Asian American Justice Center, *et al.*

clude "a State or political subdivision thereof"). Immediately following the enactment of Title VII, the exclusion of state and local governments from the statute's reach was identified as a serious shortcoming because it permitted the perpetuation of race discrimination in public sector employment. *See, e.g.*, 112 Cong. Rec. 6091-94 (1966) (statement of Sen. Javits); *Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 91st Cong. 73 (1969) (statement of Jack Greenberg, Director-Counsel, NAACP Legal Defense & Educational Fund, Inc.); *id.* at 167-68 (statement of Howard Glickstein, Staff Director, U.S. Commission on Civil Rights).[3]

In 1972, Congress amended Title VII and redefined "employer" to include state and local govern-

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[3] In addition to extensive testimony at congressional hearings in 1969, Congress heard from numerous witnesses at further hearings in 1971 who stressed the need to extend Title VII to public employers. *See Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2515, S. 2617, & H.R. 1746 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 92d Cong. 59-61 (1971) (statement of William H. Brown, Chairman, EEOC); *id.* at 197 (statement of Rev. Theodore Hesburgh, Chairman, U.S. Commission on Civil Rights); *id.* at 230 (statement of the AFL-CIO Executive Council); *id.* at 404 (statement of Paul J. Minarchenko, Legislative Rep., AFSCME). In its 1968 report on the underlying causes of recent urban disturbances, the Kerner Commission also recommended extending Title VII. *See Report of the National Advisory Commission on Civil Disorders* 234 (1968) ("Federal, state, and local efforts to [e]nsure equal opportunity in employment should be strengthened by . . . [i]ncluding Federal, state, and local governmental agencies as employers covered by Title VII of the 1964 Civil Rights Act.").

ments, governmental agencies, and political subdivisions. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972) (the "1972 Act"). In enacting the 1972 Act, Congress found that "widespread discrimination against minorities exists in State and local government employment, and . . . the existence of this discrimination is perpetuated by . . . both institutional and overt discriminatory practices." H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152. Congress further determined that "employment discrimination in State and local governments is more pervasive than in the private sector." *Id.*; *see also* S. Rep. No. 92-415, at 10 (1971), *reprinted in* S. Comm. on Labor and Pub. Welfare, 92d Cong., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 419 (1972).

Congress singled out fire departments in particular as among the most egregious employers that justified the extension of Title VII: "Barriers to equal employment are greater in police and fire departments than in any other area of State and local government. . . . Negroes are not employed in significant numbers in police and fire departments." 118 Cong. Rec. 1817 (1972) (quoting U.S. Comm'n on Civil Rights, *For ALL the people . . . By ALL the people: A Report on Equal Opportunity in State and Local Government Employment* 119 (1969) [hereinafter 1969 USCCR Report]).[4]

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[4] Throughout the congressional debates, Congress relied heavily upon the 1969 USCCR Report, which detailed pervasive discrimination against African Americans in public sector employment generally and in firefighting in particular. Senator Williams, the principal Senate sponsor of the 1972 Act, in-

Of particular relevance to this case, Congress found that "fire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job assignments, and harassment by fellow workers." *Id.* Congress also cited specific barriers to fair employment in fire departments that included the denial of promotional opportunities because of "rel[iance] on criteria unrelated to job performance and on discriminatory supervisory ratings," as well as the use of "selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities." *Id.* Congress further found that discrimination was especially acute at the supervisory level: "Negro . . . firemen hold almost no positions in the officer ranks." *Id.*

Congress was especially concerned that continued employment discrimination in firefighting and other highly visible jobs impaired government performance and democratic accountability: "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities . . . with the result that the credibility of the government's claim to represent all the people

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troduced excerpts of the 1969 USCCR Report into the Congressional Record. 118 Cong. Rec. 1815 (1972) (statement of Sen. Williams); *id.* at 1816-19; *see also Connecticut v. Teal*, 457 U.S. 440, 449-50 n.10 (1982) (noting Congress's reliance on the 1969 USCCR Report in extending Title VII to state and local employers).

equally is negated." H.R. Rep. No. 92-238, 1972 U.S.C.C.A.N. at 2153.

B. Congress Legislated Against a Backdrop of Widespread Segregation and Discrimination in Firefighting.

When Congress extended Title VII to state and local governments in 1972, racial discrimination was widespread in fire departments nationwide.

1. Many fire departments refused to hire African Americans before the late 1950s or 1960s, and those that were willing to hire African Americans only did so in rare instances, assigned them to segregated firehouses, and subjected them to severe harassment. For example, the Memphis fire department hired its first black employees in 1955, but did not integrate any fire stations until 1966. *See* 1969 USCCR Report 71. The city of Atlanta first hired black firefighters in 1961, and maintained segregated firehouses at least through 1969.[5] *See id.* at 71, 89. Other fire departments resisted integration long after this Court's decision in *Brown v. Board of*

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[5] Other fire departments were even slower to hire blacks. Birmingham did not hire its first black firefighter until 1968. *See* H.R. Rep. No. 102-40(I), at 52 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 590 (House Report on the Civil Rights Act of 1991) ("Birmingham's history of . . . segregation and discrimination against blacks is well known. Because of such discrimination Birmingham did not hire its first black police officer until 1966, its first black firefighter until 1968, [and] its second black firefighter until 1974." (alterations in original) (quoting testimony of Richard Arrington, Mayor of Birmingham)). Dallas did not hire its first black firefighter until 1969. *See City of Dallas v. Dallas Fire Fighters Ass'n*, 526 U.S. 1046, 1046 (1999) (Breyer, J., dissenting from denial of certiorari).

Education, 347 U.S. 483 (1954), outlawed segregation in public education. *See, e.g., Hammon v. Barry*, 813 F.2d 412, 434 (D.C. Cir. 1987) (Mikva, J., dissenting) (Washington, D.C. maintained all-white and all-black fire companies until 1962); *McNamara v. City of Chicago*, 959 F. Supp. 870, 874 (N.D. Ill. 1997) (Chicago maintained segregated firefighting companies until 1965), *aff'd*, 138 F.3d 1219 (7th Cir. 1998); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187, 1195 n.11 (D. Md.) ("Segregation persisted in the Baltimore Fire Department for more than a decade after [*Brown*]."), *aff'd in relevant part sub nom. Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973); 1969 USCCR Report 71 (Baton Rouge maintained segregated fire stations at least through 1969).

Even after many fire departments were officially desegregated, black firefighters were routinely barred from using the same shared living and sleeping quarters as whites. For example, after Washington, D.C. firehouses were desegregated in the 1960s, black firefighters were required for more than a decade to sleep in designated "C" beds and eat from separate "C" dishes and "C" utensils, for "Colored." *Hammon*, 813 F.2d at 434; *see also Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977) (describing all-white "supper clubs" that persisted in the St. Louis fire department through the late 1970s and required blacks to "cook[] and eat[] apart from their white associates"); 1969 USCCR Report 71, 89 (finding that the only black firefighter employed in San Francisco in 1967 was required to carry his own mattress between stations during his training period); Robert J. Crawford Sr. with Delores A. Crawford, *Black Fire: Portrait of a*

Black Memphis Firefighter 64, 69 (2007) [hereinafter *Black Fire*] (black firefighters in Memphis slept in designated "Jim Crow" beds through the late 1960s). Nor did formal integration end racial hostility and discrimination, such as the assignment of blacks to the most dangerous positions on the job. *See* John C. McWilliams, *"Men of Colour": Race, Riots, and Black Firefighters' Struggle for Equality from the AFA to the Valiants*, 41 J. Soc. Hist. 105, 114 (Fall 2007).[6]

Those fire departments that did not entirely exclude black firefighters frequently manipulated hiring procedures to screen out black applicants. For instance, in the same year that the Memphis fire department eliminated its ban on hiring of African Americans, it also instituted—for the first time in its history—a high school diploma requirement, and then applied this requirement selectively to black candidates for more than two decades. *See Black Fire* 52, 105; *see also* David A. Goldberg, Courage Under Fire: African American Firefighters and the Struggle for Racial Equality 125-29, 254, 288 (Feb. 2006) (unpublished Ph.D. dissertation, University of Massachusetts Amherst) (describing changes in hiring procedures in New York City, Los Angeles, and Baltimore during the 1950s and 1960s that had the effect of restricting African American hiring).

In 1973, the National Commission on Fire Prevention and Control found widespread use of hiring practices unrelated to successful performance as a firefighter, with the result that "[r]acial minorities

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[6] As discussed in Part II.B.2, *infra*, segregation and harassment of African American firefighters are by no means historical practices only.

are under-represented in the fire departments in nearly every community in which they live." Nat'l Comm'n on Fire Prevention & Control, *America Burning* 5, 35-37 (1973); *see also* Bill Kovach, *Race Discrimination Found in U.S. Fire Departments*, N.Y. Times, June 5, 1973, at 30 (quoting a staff member of the National Commission stating that "our fire departments are correctly called the last white man's country club").

Hiring barriers were paired with widespread refusal to recruit black candidates. *See* 1969 USCCR Report 87 ("[F]ire departments have not usually tried to recruit minority group members no matter how poorly they may have been represented in the department."). Given the historical exclusion of blacks from firefighting jobs, reliance on word-of-mouth recruiting and nepotism also led to disproportionately low numbers of black applicants. *See, e.g.*, *Dozier v. Chupka*, 395 F. Supp. 836, 841, 849 (S.D. Ohio 1975) (holding that informal recruitment methods perpetuated racial discrimination because "whites only drew more whites to a predominantly white force").

2. The exclusion of African Americans from meaningful participation in firefighting jobs was also perpetuated through discriminatory promotional practices. White supervisors often used discriminatory ratings and assignments to keep black firefighters from advancing. *See, e.g.*, *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 588 F.2d 235, 241-42 (8th Cir. 1978) (holding that the St. Louis fire department's practice of disproportionately assigning temporary supervisory positions to whites deprived black firefighters of opportunities for supervisory

experience); *McNamara*, 959 F. Supp. at 875; *Black Fire* 79; 1969 USCCR Report 86. Black firefighters were also denied the training and mentoring that white firefighters received. *See McNamara*, 959 F. Supp. at 874-75; *Harper*, 359 F. Supp. at 1194 & n.7 (describing Baltimore firefighter's testimony that promotion exam materials were made "freely available to whites" in the firehouse but not shown to him); *see also Black Fire* 47-50, 52; Carol Chetkovich, *Real Heat: Gender and Race in the Urban Fire Service* 84-85, 116-17 (1997). Some fire departments adopted formal or informal quotas that prevented qualified blacks from being promoted. *McNamara*, 959 F. Supp. at 875 (finding that in Chicago, until the late 1970s, "a black would not be promoted to these upper ranks unless another black vacated the position").

As a result, black firefighters have typically been promoted at a much slower rate than white firefighters. *See id.*, 959 F. Supp. at 875 (reviewing promotional statistics in Chicago from 1973 to 1993 and finding that "[t]he length of time it has taken for blacks to be promoted from firefighter to lieutenant has been significantly longer than that for whites"); *Black Fire* 52.

3. Because firefighters are required to share living space while on the job, firefighting has been particularly resistant to racial integration. The pattern of exclusion, segregation, and discrimination described above has been reinforced and perpetuated by this particular feature of the job. *See* 1969 USCCR Report 87 ("[T]he unusual working arrangement of firemen has given rise to many forms of prejudiced attitudes and treatment.").

Firefighters are typically assigned to work twenty-four-hour shifts, and live, eat, and work at their fire station while on duty. *See Mems v. City of St. Paul, Dep't of Fire & Safety Servs.*, 327 F.3d 771, 775 (8th Cir. 2003); Denise M. Hulett *et al.*, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 Int'l J. of Diversity in Organisations, Communities & Nations 189, 190 (2008) [hereinafter *Enhancing Inclusion*]. While these facets of firefighting—combined with its prestige, good pay, job security, and valuable societal contribution—have made it a desirable job for many Americans, they have also created an organizational culture that has been particularly resistant to integration. As the U.S. Commission on Civil Rights found, "[b]ecause firemen live together, fire department integration involves a greater degree of intimacy . . . [and has] been more vigorously resisted." 1969 USCCR Report 88.

This distinctive firefighting culture is a primary reason that fire departments resisted efforts to eliminate discrimination longer and more vigorously than perhaps any other employer, with the result that, as discussed in Part II, *infra*, discrimination persists today despite nearly four decades of enforcement efforts.

II. Egregious Discrimination Persists in Fire Departments Nationwide, Despite Efforts to Enforce Title VII's Mandate.

As noted, the 1972 Act extended Title VII's reach to state and local government employers. One year earlier, this Court held that Title VII permitted employees to challenge not only overt discrimination but also job-selection procedures "that operate as

'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432. In the nearly four decades since *Griggs* and the 1972 Act, Title VII enforcement has yielded partial, uneven results. While employment practices in many fire departments have improved since the 1970s, discrimination and racial disparities persist, both in New Haven and throughout the country.

A. New Haven Has Yet to Eliminate the Effects of Entrenched Racially Discriminatory Practices in Its Fire Department.

Petitioners contend that "New Haven and its officials have a documented history of violating Connecticut law to give minorities advantageous treatment in public employment." Pet. Br. 29; *see also id.* at 5-6. This assertion is false. As respondents themselves acknowledge, "the City Fire Department's litigation history demonstrates discrimination against African-Americans, not whites." Resp't Br. 38-39.[7] And the historical and present record make clear that although New Haven has made some progress

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[7] Petitioners cite four recent cases in support of their claim that New Haven "stood accused in multiple suits of repeatedly and intentionally discriminating against whites." Pet. Br. 5. But each cited case deals with a dispute over the interpretation of various civil service rules, and not one includes a finding that New Haven currently—or ever—discriminated against white employees. *See Kelly v. City of New Haven*, 881 A.2d 978, 981-82, 986, 1000-01 (Conn. 2005); *Hurley v. City of New Haven*, No. 054009317, 2006 WL 1609974, at *1-*5 (Conn. Super. Ct. May 23, 2006); *Henry v. Civil Serv. Comm'n*, No. 411287, 2001 WL 862658, at *1, *3 (Conn. Super. Ct. July 3, 2001); *Bombalicki v. Pastore*, No. 378772, 2001 WL 267617, at *1, *9-*10 (Conn. Super. Ct. Feb. 28, 2001), *aff'd*, 804 A.2d 856 (Conn. App. Ct. 2002); *see also* Resp't Br. 4-5, 38-39 & n.34.

toward inclusion of blacks, principally in entry-level firefighting positions, it has never eradicated racial discrimination from its firefighting workforce.

1. When the New Haven fire department first became subject to Title VII in 1972, it mirrored the historical nationwide pattern of black exclusion from firefighting. As of the following year, the department had barely opened its ranks to minority firefighters: only 18 of 502 firefighters (3.6%) were black and none was Hispanic, though New Haven's population was 30% black and Hispanic at the time. *See Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457, 460 (D. Conn.), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975). The exclusion of black firefighters was even more pronounced at the supervisory level: "of the 107 officers in the Department only one was black, and he held the lowest rank above private." *Id.*

In 1973, the Firebird Society—an organization of black firefighters in the New Haven fire department—sued the department to challenge "a pattern of willful discrimination" in hiring and promotions. *Id.* at 459-60. The lawsuit challenged "almost all aspects of the hiring and promotional practices" of the fire department, and alleged that New Haven's entry exam, minimum requirements, promotional exam, time-in-grade requirements, and the use of supervisory recommendations in promotions were all discriminatory devices. *Id.* The suit ended in a consent decree requiring the department to increase minority recruiting, develop job-related entrance and promotional exams, and modify other promotional practices to diminish the adverse impact of those practices on black firefighters. *Id.* at 461-63.

In 1989, the Firebird Society again filed suit to challenge discrimination against black and Hispanic firefighters in promotions. *See New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 593 A.2d 1383, 1384 (Conn. 1991). A Connecticut appellate court upheld a trial court finding that the department's long-standing practice of disproportionately promoting white individuals to positions that were not yet vacant, just prior to the expiration of a promotion eligibility list, violated civil service laws. *See New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 630 A.2d 131, 134-35 (Conn. App. Ct. 1993).

In 1998, black firefighters sued New Haven to challenge the practice of using lower-ranked officers to fill positions budgeted for a higher rank. *See Broadnax v. City of New Haven*, 851 A.2d 1113, 1118 & n.2 (Conn. 2004). This practice, known as "underfilling," introduced a larger number of white lieutenants into the candidate pool for captain exams, and resulted in blacks receiving fewer promotions. *Id.* at 1122, 1130, 1138. In 2004, the Connecticut Supreme Court affirmed the trial court's ruling that the practice violated civil service laws, and reversed the trial court's dismissal of the plaintiffs' claim of intentional discrimination against black firefighters. *Id.* at 1131-36, 1138-39. Two of the plaintiffs, John Brantley and Christopher Texeira, won sizeable jury verdicts and awards of front pay and back pay based on those claims of race discrimination. *See Broadnax v. City of New Haven*, No. CV980412193S, 2008 WL 590818, at *1-*2 (Conn. Super. Ct. Feb. 19, 2008); *Broadnax v. City of New Haven*, No. CV980412193S, 2007 WL 155138, at *1 (Conn. Super. Ct. Jan. 2, 2007).

2. Despite these repeated and successful lawsuits challenging discrimination against black employees, New Haven has made limited progress in promoting minority firefighters. Severe shortfalls persist in the number of African Americans among the officer ranks—the very positions at issue in this litigation.

For example, in 1973, there were no African Americans among the thirty-four captains in the department. *Firebird Soc'y*, 66 F.R.D. at 460. More than three decades later, the department's improvement is marginal: in 2005, just one out of twenty-one captains was black. JA217. Within the officer ranks as a whole, minorities are similarly under-represented. Of thirty-two officers at the level of captain or higher, there were just three African Americans and three Hispanics in 2005. JA218.

This significant shortfall is not due to a shortage of black entry-level firefighters, where—in contrast to the supervisory ranks—New Haven has made some progress in hiring people of color. According to New Haven's most recent EEO-4 data,[8] in 2007, African Americans held 32% of entry-level positions in the fire department, but only 15% of supervisory positions. *See* City of New Haven, State and Local Government Information Report EEO-4 (2007).

This substantial disparity between minority representation in entry-level and supervisory positions suggests the presence of systematic barriers to ad-

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[8] An EEO-4 Report is a report that state and local governments with over one hundred employees are required to submit biennially to the EEOC, recording the number of employees by race, sex, and job function (including fire protection). *See* 29 C.F.R. §§ 1602.30, 1602.32.

vancement for minorities, because the skills needed to perform effectively as a supervisor are generally those learned through observation and performance on the job as an entry-level firefighter. *See In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1537-38 & n.18 (11th Cir. 1994) ("Training and experience as a firefighter are special skills required of those who would become fire lieutenants. As such, to determine if an imbalance existed . . . the appropriate comparison is between black representation in the . . . lieutenant ranks and black representation among entry-level firefighters.").[9] This disparity also highlights the distance New Haven has yet to travel in redressing the concerns that originally motivated the extension of Title VII through the 1972 Act. *See* 118 Cong. Rec. 1817 (1972) (finding that "[p]romotional opportunities are not made available to minorities on an equal basis. . . . Negro . . . firemen hold almost no positions in the officer ranks.").

B. Nationally, Overt Discrimination and Racial Disparities Persist in Firefighter Employment.

The experience of black firefighters in New Haven reflects the experiences of black firefighters around the country. Although Title VII enforcement

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[9] *See also Stuart v. Roache*, 951 F.2d 446, 450-52 (1st Cir. 1991); *Horan v. City of Chicago*, No. 98-C-2850, 2003 WL 22284090, at *53 (N.D. Ill. Sept. 30, 2003) ("The work of a firefighter, an engineer, a lieutenant, a captain, and a battalion chief is largely learned through observation and on-the-job training. . . . The evidence at trial established that on average, whites, African-Americans, and Latinos have performed equally well in each of these positions.").

efforts have yielded some progress, it has been fitful and incomplete.

1. Shortly after Congress passed the 1972 Act, private litigants as well as the United States Department of Justice, through its Civil Rights Division, began challenging discrimination by fire departments against minorities and women. *See* U.S. Comm'n on Civil Rights, *To Eliminate Employment Discrimination, A Sequel: The Federal Civil Rights Enforcement Effort—1977*, at 270 (1977). These enforcement actions resulted in judicial findings of unlawful discrimination against African Americans by fire departments in all regions of the country, including Cleveland, Birmingham, St. Louis, New York City, Newark, Bridgeport, Buffalo, Philadelphia, Massachusetts (state-wide), San Francisco, Baltimore, and Minneapolis.[10]

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[10] *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 506 (1986) (citing *Headen v. City of Cleveland*, No. C73-330 (N.D. Ohio Apr. 25, 1975)) (Cleveland); *Ensley Branch, NAACP v. Seibels*, 616 F.2d 812, 814, 816-22 (5th Cir. 1980) (Birmingham); *Firefighters Inst.*, 549 F.2d at 509-15 (St. Louis); *Vulcan Soc'y of N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 490 F.2d 387, 391-98 (2d Cir. 1973) (New York City); *United States v. New Jersey*, 530 F. Supp. 328, 334-38 (D.N.J. 1981) (Newark); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 479 F. Supp. 101, 104-11 (D. Conn. 1979) (Bridgeport), *aff'd in relevant part*, 647 F.2d 256 (2d Cir. 1981); *United States v. Buffalo*, 457 F. Supp. 612, 621-23, 627-29, 639 (W.D.N.Y. 1978) (Buffalo), *aff'd in relevant part*, 633 F.2d 643 (2d Cir. 1980) (per curiam); *Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1480 (E.D. Pa. 1975) (Philadelphia); *Boston Chapter, NAACP v. Beecher*, 371 F. Supp. 507, 513-17 (D. Mass.) (Massachusetts state-wide), *aff'd*, 504 F.2d 1017 (1st Cir. 1974); *W. Addition Cmty. Org. v. Alioto*, 369 F. Supp. 77, 79 (N.D. Cal. 1973) (San Francisco);

Other fire department lawsuits were resolved through settlement agreements negotiated after employers were confronted with compelling evidence of segregation of black employees, deliberate exclusion of blacks from the workforce, and gross racial disparities caused by non-job-related selection devices. *See, e.g.*, *Vulcan Pioneers, Inc. v. N.J. Dep't of Civil Serv.*, 832 F.2d 811, 813 (3d Cir. 1987) (covering twelve fire departments in New Jersey); *United States v. City of Alexandria*, 614 F.2d 1358, 1365-66 & n.14 (5th Cir. 1980) (approving a consent decree in light of egregious racial disparities in forty-five local fire and police departments in Louisiana), *abrogated on other grounds as recognized in Dean v. City of Shreveport*, 438 F.3d 448, 452 n.1 (5th Cir. 2006); *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't*, Nos. 78 Civ. 0911, 80 Civ. 0336, 1996 WL 481066, at *1 (S.D.N.Y. Aug. 23, 1996) (describing 1981 consent decrees covering four fire departments in Westchester County, New York); *Alexander v. Bahou*, 86 F.R.D. 194, 196, 198-204 (N.D.N.Y. 1980) (entering consent decree covering Syracuse fire and police departments).

In many cases, however, consent decrees proved insufficient to root out persistent discrimination. For instance, the Third Circuit in 1983 described "the tenacious grasp of discrimination" in the Wilmington, Delaware fire department, notwithstanding a prior consent decree. *See Wilmore v. City of Wilmington*, 699 F.2d 667, 668, 675 (3d Cir. 1983)

Harper, 359 F. Supp. at 1194-1212 (Baltimore); *Carter v. Gallagher*, 3 Fair Empl. Prac. Cas. (BNA) 692, 693, 695-700, 708 (D. Minn. 1971) (Minneapolis), *aff'd in relevant part*, 452 F.2d 315 (8th Cir. 1972) (en banc).

(noting that minorities made up 48% of Wilmington's labor force but only 15% of the firefighter force and 4% of the officer ranks, and explaining that important training opportunities were assigned exclusively to whites because of the "personal preferences" of superior officers).

2. As a result of these private and federal enforcement efforts, there has been some progress, if uneven, in firefighter employment, but discrimination and racial disparities persist.

Explicit, intentional discrimination endures. As late as 2004, most black firefighters in Cleveland were assigned to station houses within one battalion that was "pejoratively labeled 'Monkey Island.'" *Jordan v. City of Cleveland*, 464 F.3d 584, 589 & n.6, 597 (6th Cir. 2006) (noting also that one predominantly white firehouse featured "a 'Wall of Hate,' a partition erected by white firefighters with derogatory comments directed toward black firefighters . . . [that] remained in place until 1999"). These are not isolated incidents. Minority firefighters nationwide continue to experience disparate treatment: According to a recent survey, 44.7% of firefighters of color reported that they have been treated differently because of their race during their careers. *See Enhancing Inclusion* 195.

Disparities in hiring and promotions also persist. Census data reveal significant under-representation of African Americans and other minorities in fire departments at the national and local levels. A recent study of 2000 census data concluded that nationwide, racial and ethnic minorities accounted for 16.7% of the firefighter workforce, compared to

30.1% of benchmark occupation[11] *Id.* at 193. Accordingly, persons of color were employed at just over half of their expected rate compared to benchmark jobs. *Id.*

Recent findings of liability for Title VII disparate impact discrimination against black firefighters bear out these national figures. Entrance examinations continue to produce gross and unjustified disparate impact in firefighter hiring, even in municipalities that have long been subject to enforcement efforts aimed at opening the firefighter ranks. For example, the state of Massachusetts was recently found to have violated Title VII by using state-wide firefighter hiring exams in both 2002 and 2004 that had an unjustified adverse impact on minority candidates. *See Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 167-75 (D. Mass. 2006). The district court concluded that the multiple-choice exams in question were not job-related because they did not test for important skills that were predictive of an applicant's future success on the job. *See id.* at 172-73. The state's continuing discriminatory testing practices occurred notwithstanding enforcement efforts begun over thirty years ago to eradicate hiring discrimination in firefighter jobs throughout Massachusetts. *See Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1018, 1026-28 (1st Cir. 1974); *see also Bradley*, 443 F. Supp. 2d at 150-51, 175-76 (describing the *Beecher* litigation and noting that "[t]hirty

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[11] The study defined benchmark occupations to include 184 jobs that share with firefighting the characteristics of being "demanding, dirty, or dangerous." *Enhancing Inclusion* 193.

years later, not much has changed").[12]

Fire departments have also been subject to recent enforcement action for imposing hiring standards that disproportionately screen out black candidates and bear no relationship to the job of firefighting. The Department of Justice entered into a settlement agreement last month with the city of Dayton, Ohio, where the past twenty-five years have seen a dramatic decline in African Americans in the city's fire department, from 7.0% in 1984 to 2.4% in 2008. *See* Proposed Consent Decree, *United States v. City of Dayton*, No. 3:08-cv-348 (S.D. Ohio Feb. 26, 2009); Complaint ¶¶ 6, 8, *United States v. City of Dayton*, No. 3:08-cv-348 (S.D. Ohio Sept. 26, 2008) (blacks make up only 2.4% of firefighters compared to 36.8% of the city's civilian labor force). The settlement requires the city to eliminate a certification requirement it imposed on entry-level applicants that disproportionately screened out black candidates. *See* Proposed Consent Decree ¶¶ 9-11, *United States v. City of Dayton*.

Towns in the New Haven metropolitan area also continue to have egregious problems in firefighter hiring. East Haven, which is adjacent to New Haven, has been particularly slow to hire black employ-

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[12] Other jurisdictions have recently been found to discriminate against black applicants in firefighter hiring as well. *See, e.g., Lewis v. City of Chicago*, No. 98-C-5596, 2005 WL 693618, at *8-*15 (N.D. Ill. Mar. 22, 2005) (holding that Chicago discriminated against black applicants in firefighter hiring between 1996 and 2001 by using exam results that had an unjustified racially disparate impact), *rev'd on other grounds*, 528 F.3d 488 (7th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Jan. 21, 2009) (No. 08-974).

ees—as of 1996, East Haven had never hired a single black police or fire department employee. *See NAACP v. Town of E. Haven*, 998 F. Supp. 176, 178, 185-88 (D. Conn. 1998) (ruling that East Haven must alter its recruitment efforts to overcome the "perception in the black community that the Town is closed to black employment, unwelcomingly hostile, and resistant"); *see also* Mark Zaretsky, *6 Years After Suit, NAACP Says East Haven Should Try Harder*, New Haven Reg., Mar. 1, 2004 (noting that by 2004, East Haven had three black volunteer firefighters but not a single paid minority firefighter).

In addition to these recent findings and settlements, there are numerous disparate impact lawsuits pending around the country that challenge unjustified racial disparities in black firefighter employment. For example, a pending lawsuit in New York City challenges disparate impact in two firefighter hiring exams and notes that New York City's fire department is currently made up of only 3% black firefighters, in a city that is nearly 27% black[13]—evidencing only marginal progress in the decades since 1973, when the Second Circuit held that the New York fire department's selection procedures impermissibly discriminated against black and Hispanic applicants. *See* Complaint ¶¶ 1, 6, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. May 21, 2007); Plaintiff-Intervenors' Complaint ¶¶ 1-2, 30-31, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. Sept. 25, 2007); *Vulcan Soc'y of*

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[13] *See* U.S. Census Bureau, State & County QuickFacts, New York (city), New York, http://quickfacts.census.gov/qfd/states/36/3651000.html.

N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 391-98 (2d Cir. 1973).[14]

The volume and nature of this ongoing litigation make clear the continuing extent of racial discrimination in firefighting jobs not only in New Haven but throughout the country.

III. The History and Persistence of Racial Discrimination in Firefighting Should Inform the Court's Resolution of This Case.

The persistence of discrimination in firefighting provides justification for a municipal employer to suspend promotions based on a selection device with significant racial disparities, especially where, as here, the employer reasonably believed that the testing procedures were flawed and that less discriminatory alternatives were available.

A. Title VII Does Not Prohibit Employers from Declining to Use Selection Procedures that May Perpetuate Racial Disparities in Traditionally Segregated Job Categories.

Past and present context is critically relevant in assessing both New Haven's effort to comply with Title VII and petitioners' challenge to New Haven's actions.

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[14] *See also Coffey v. Braddy*, No. 3:71-cv-44, 2009 WL 591280, at *3 (M.D. Fla. Mar. 6, 2009) (reopening lawsuit challenging discrimination against black applicants in Jacksonville, Florida firefighter hiring); *Bazile v. City of Houston*, No. H-08-2404, 2008 WL 4899635, at *2-*6 (S.D. Tex. Nov. 12, 2008) (denying motion to dismiss black firefighters' Title VII claims regarding promotional exams).

In justifying its decision to reject racially disparate results from an employee selection practice, an employer need not *prove* that use of the practice would violate Title VII or even amount to an "arguable violation." *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 630 (1987) (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 212 (1979)). Rather, an employer "need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories,'" and demonstrate that its actions to address that imbalance do not "unnecessarily trammel" the interests of any adversely affected employees. *Id.* at 630 (quoting *Weber*, 443 U.S. at 208-09).

Petitioners argue that respondents' decision to suspend the 2003 promotions was motivated by illegal discrimination against white firefighters. Pet. Br. 18-20, 23-27, 45-47. But in light of the record in this case and New Haven's ongoing efforts to overcome the legacy of discrimination in its fire department, petitioners cannot meet their burden to show a dispute of material fact to support their allegation that New Haven's non-discriminatory rationale—compliance with Title VII—is a pretext for unlawful discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981).

Respondents easily satisfy the standard set forth in *Johnson* and *Weber*. As described in Part II.A, *supra*, there is presently a conspicuous imbalance within New Haven's firefighter ranks, especially within the lieutenant and captain positions that are at issue in this case. Petitioners themselves concede that if minority firefighters had challenged the pro-

motional exams at issue here, the test results would have constituted prima facie evidence of a disparate impact violation, *see* Pet. Br. 50-51, a showing that this Court has held is far more than sufficient to meet the conspicuous imbalance requirement. *Johnson*, 480 U.S. at 632-33 & n.10.

In addition, the historical record makes clear that firefighting—both in New Haven and throughout the country—is a "traditionally segregated job category." *Id.* at 632. Indeed, New Haven has a long history of discrimination against African Americans in its firefighting force, and especially in the supervisory ranks. *See* Part II.A, *supra*.

Finally, New Haven's actions did not unnecessarily trammel petitioners' interests. New Haven did not create an "absolute bar" to petitioners' advancement, and did not impose any racial quotas. *Johnson*, 480 U.S. at 637-39. New Haven simply decided not to certify the racially-disparate results of promotional tests, having determined that there would be equally effective ways to select candidates for promotional positions with less adverse impact.[15] *See* 29

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[15] There have been some instances where efforts to redress discrimination against minorities in firefighting have been successfully challenged by white employees. *See, e.g., Dean*, 438 F.3d at 452-53, 462-63 (holding that part of the city of Shreveport's firefighter hiring process, adopted to comply with a 1980 consent decree, violated Title VII by establishing different cut-off scores—and therefore different hiring lists—by race); *Biondo v. City of Chicago*, 382 F.3d 680, 682-85 (7th Cir. 2004) (holding that Chicago violated Title VII and the Equal Protection Clause by creating separate promotions lists by race and then promoting from each list in strict proportion to the racial make-up of all test-takers). However, respondents' actions here did not involve anything like the quotas or other aggressive

C.F.R. §§ 1607.3, 1607.4(C)(1) (EEOC Uniform Guidelines on Employee Selection Procedures). All of the petitioners retained their current jobs and have not even alleged that they will be unable to compete with all other eligible firefighters when new promotional exams are developed and implemented. *See Johnson*, 480 U.S. at 638.

As the United States explains in its amicus brief, petitioners cannot show that New Haven's non-discriminatory reason is pretextual unless petitioners can demonstrate that the city's concerns about Title VII compliance were "unreasonable." Br. of United States 17. Petitioners fail to meet that burden. The reasonableness of New Haven's actions is amply supported by the gross racial disparity in the test results, *see* Resp't Br. 27-28, the substantial doubts regarding the tests' job-relatedness that emerged during the Civil Service Board hearings, *see* Resp't Br. 28-32, and the evidence of less discriminatory alternatives, *see* Resp't Br. 32-35.[16]

The history and persistence of discrimination in New Haven's fire department further undercut any

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remedial plans that have been successfully challenged by white firefighters in the past; rather, the city's efforts represented a modest attempt to ensure compliance with the core principles of Title VII. *See* Resp't Br. 5-10.

[16] The amicus brief of well-reputed industrial psychologists makes clear that New Haven's promotional tests fell well short of the standard set by other fire departments around the country in developing selection processes that are better able to identify candidates with the knowledge, skills, abilities, and other personal characteristics needed to perform successfully as fire lieutenants and captains. *See* Br. of Amici Industrial-Organizational Psychologists.

contention that the city's stated motives were pretextual. Given New Haven's uneven and incomplete efforts to eliminate the longstanding barriers to promotion of minority firefighters, it is surely reasonable for the Civil Service Board to engage in a transparent review process when faced with promotional tests that produce unexpectedly large racial disparities. "[V]oluntary employer action can play a crucial role in . . . eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts." *Johnson*, 480 U.S. at 630.

B. Employer Efforts to Ensure Fair Selection Procedures Do Not Trigger Strict Scrutiny.

Petitioners' contention that constitutional strict scrutiny should be triggered by New Haven's actions, Pet. Br. 21-27, is fundamentally an attack on Title VII's disparate impact standard as articulated by this Court in *Griggs* and codified by Congress in the Civil Rights Act of 1991. See *Griggs*, 401 U.S. at 429-30, 436; 42 U.S.C. § 2000e-2(k)(1)(A). As detailed above, since the extension of Title VII to states and localities, the disparate impact standard has played a key role in enforcement actions to root out pervasive discrimination in firefighting by dismantling tests that are unrelated to job performance.[17]

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[17] In fact, in codifying the disparate impact standard in the Civil Rights Act of 1991, Congress again relied specifically on evidence of discrimination in firefighting and recognized the importance of the disparate impact standard in challenging ongoing discrimination in firefighter employment. *See* H.R. Rep. No. 102-40(I), at 99-100 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 637-38.

This Court recognized in *Griggs* that Title VII reflected Congress's intent to impose upon employers an affirmative obligation "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. This obligation is especially important where, as here, racial discrimination has endured in a particular workforce. *See Weber*, 443 U.S. at 197-99, 203-04 ("[T]he crux of the problem [addressed by Title VII was] to open employment opportunities to Negroes in occupations which have been traditionally closed to them." (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey))).

Petitioners do not suggest that there was a need for heightened constitutional review of New Haven's efforts to design promotional tests that complied with Title VII. *See* Pet. Br. 6-10, 41; *cf. Hayden v. County of Nassau*, 180 F.3d 42, 46 (2d Cir. 1999). The level of constitutional scrutiny should not be increased simply because New Haven determined—after its new promotional tests yielded even greater racial disparities than prior tests, *see* Resp't Br. 6—that additional steps were necessary to avoid perpetuating discrimination in the fire department's racially-stratified promotional ranks. The City's additional steps here (including the decision to investigate further, the identification of possible flaws in the test design, the consideration of less discriminatory alternatives, and the conclusion that the test results should not be certified) did not involve the allocation of specific positions to particular individuals or any other "dispositions based on race." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239

(1995) (Scalia, J., concurring). Even assuming that compliance with a civil rights statute is a race-conscious measure, strict scrutiny does not apply to such "race-conscious measures to address [a] problem in a general way." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792-93 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

C. If Strict Scrutiny Applies, Title VII Compliance is a Compelling Interest in Light of the History and Persistence of Discrimination in Firefighting.

If strict scrutiny applies, this Court should find that New Haven had a compelling interest in complying with Title VII. As an initial matter, notwithstanding petitioners' suggestion to the contrary, Pet. Br. 28-33, none of this Court's precedents in any way suggest that a public employer does not have a compelling interest in avoiding a violation of Title VII's disparate impact proscription. As demonstrated in Part I.A, *supra*, when Congress decided in 1972 to extend Title VII to state and local employers, it had before it a record filled with evidence of egregious racial discrimination by public employers generally and fire departments in particular.

The central dispute with respect to petitioners' constitutional claim focuses on the amount of evidence that New Haven was required to present to show a "strong basis in evidence" that its actions were necessary to advance a compelling interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)). Under

this Court's precedents, it is clear that the requisite showing is something less than proof of prior discrimination. *Id.*; *see also Wygant*, 476 U.S. at 277-78 (plurality opinion); *id.* at 290-92 (O'Connor, J., concurring). In *Croson*, this Court indicated that the "strong basis" requirement is satisfied by evidence "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500. On the facts of this case, the Court need not resolve whether, as *Croson* suggests, something *less than* a prima facie case may suffice, because petitioners acknowledge that the evidence of adverse impact in the promotional tests at issue would suffice to establish a Title VII prima facie case. Pet. Br. 50-51.

The rationale behind and historical development of the Title VII disparate impact framework compel the conclusion that the "strong basis" test is satisfied by a prima facie showing of disparate impact.[18] One of the primary purposes of the disparate impact standard is to screen out subtle or surreptitious intentional discrimination. *See In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1322

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[18] Applying *Croson*'s standard, a number of federal courts have held that the demonstration of a prima facie case of Title VII disparate impact is sufficient to satisfy the "strong basis in evidence" requirement. *See Donaghy v. City of Omaha*, 933 F.2d 1448, 1458-60 (8th Cir. 1991); *Davis v. City of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47 (9th Cir. 1989); *Howard v. McLucas*, 871 F.2d 1000, 1007-08 (11th Cir. 1989) (citing *Howard v. McLucas*, 671 F. Supp. 756, 760-61 (M.D. Ga. 1987)); *United States v. New Jersey*, 75 Fair Empl. Prac. Cas. (BNA) 1602, 1611, 1614-15 (D.N.J. 1995); *Paganucci v. City of New York*, 785 F. Supp. 467, 477 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 310, 312 (2d Cir. 1993) (adopting the district court's reasoning).

(11th Cir. 1999). As Eleventh Circuit Judge Tjoflat has noted:

> [A] *prima facie* finding of disparate impact by the court means that the plaintiff has demonstrated that the challenged practice (and not something else) actually *causes* the discriminatory impact at issue. Though the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive since a racial "imbalance is often a telltale sign of purposeful discrimination."

Id. at 1321 (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339-40 n.20 (1977)). In other words, the Title VII disparate impact framework provides a powerful evidentiary tool in cases where discrimination may otherwise be difficult to prove; it proceeds by countering ordinary explanations other than discriminatory intent for an employment policy or practice with a demonstrably adverse impact.

Equally important, the disparate impact framework is also intended to eliminate employment practices that may be neutral on their face but nevertheless perpetuate racial disparities without business justification, thereby "freezing" in place the status quo created by prior racial discrimination. *Griggs*, 401 U.S. at 430; *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation

be functionally equivalent to intentional discrimination.").

Accordingly, a prima facie case of disparate impact is tantamount to evidence of either surreptitious intentional discrimination or self-perpetuating racial hierarchy in the workplace. Prohibiting public employers from taking remedial action in such contexts—especially in a job category like firefighting that is characterized by both past and present discrimination—would severely undermine Title VII's goal of encouraging voluntary compliance. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) ("Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."). Voluntary compliance is particularly essential because Title VII "aims, chiefly, 'not to provide redress but to avoid harm.'" *Id.* at 545 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

New Haven should not be penalized for heeding Congress's clear directive that employers "self-examine" their employment practices and voluntarily cease those practices that perpetuate discrimination. *Albemarle*, 422 U.S. at 417-18.

CONCLUSION

For the foregoing reasons, as well as those outlined by respondents, the decision below should be affirmed.

Respectfully submitted,

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